

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**PAULA PAUL, as Executrix of the
Estate of Helen F. Walker,**

Plaintiff/Appellee,

v.

APPEAL NO. 33225

(Appealed from Civil Action No. 03-C-1937)

**OPTION ONE MORTGAGE
CORPORATION, a corporation,
and H & R BLOCK MORTGAGE
CORP., a corporation,**

Defendants/Appellants.

APPELLANTS' REPLY BRIEF

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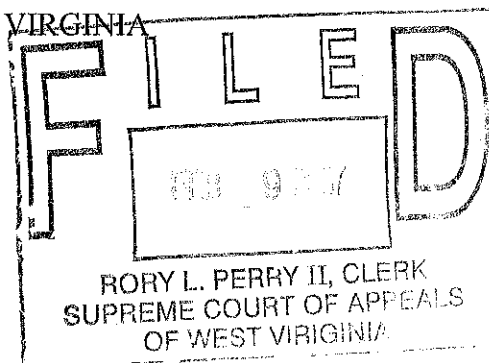


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I. Introduction

On August 30, 2005, the Appellants, Option One Mortgage Corporation and H&R Block Mortgage Corporation (the "Appellants"), petitioned this Court for appeal of an interlocutory order of the Circuit Court of Kanawha County, West Virginia ("Circuit Court") erroneously denying Appellant's motion to file a compulsory counterclaim and a third-party complaint ("Motion").

The Circuit Court order prevented the Appellants from asserting a compulsory counterclaim against Helen Walker ("Walker")¹ and a third-party complaint against Walker's daughter who lived with her, Paula Walker Paul ("Paul"), which stems from the underlying litigation in the Circuit Court.

Appellants' Petition for Appeal was granted on November 15, 2006, and Appellants were given thirty days to file their brief. On November 22, 2006, Appellee, Paula Walker Paul, as executrix of the estate of Helen Walker (the "Appellee"), filed a Motion to Dismiss the Appeal. Thereafter, on December 8, 2006, the Appellants filed a written response in opposition to the Appellee's Motion. The Appellee's Motion to Dismiss was denied on January 24, 2007. December 13, 2006, counsel for the Appellee filed a Motion to Withdraw as counsel that was also denied on January 24, 2007.

On December 15, 2006, the Appellants filed their Appellants' Brief. In response, the Appellee filed her Appellee's Brief late on January 29, 2007. The Appellee's Brief makes three short arguments. First, the Appellee asserts that the standard of review is abuse of discretion and that the Circuit Court did not abuse its discretion in the present case. Appellants agree that the standard of review is an abuse of discretion standard, but disagree with the Appellee's assertion

¹ Paula Walker Paul, as executrix of Helen Walker's estate, is now the Appellee. For convenience sake, we sometimes refer to the Appellee as Walker.

that the Circuit Court's discretion was not abused. Second, Appellee asserts that the Supreme Court of Appeals of West Virginia does not have jurisdiction to hear this appeal from the Circuit Court's interlocutory order. Appellants disagree with this claim. This Court does "have jurisdiction" to hear this Appeal because the order was final with respect to Appellants' claims against Appellee and Paul.² Finally, the Appellee asserts that it is unclear what relief the Appellants are seeking and that counsel for the Appellee does not represent Paul in her personal capacity. Appellants want to pursue their right to damages as specified in the amended pleading they were prevented from filing. Accordingly, Appellants request that this Court reverse the ruling of the Circuit Court and direct that Appellants' Motion be granted.

II. Argument

A. The Circuit Court Abused its Discretion by Denying Appellants' Motion to File a Compulsory Counterclaim and Third-Party Complaint

The Circuit Court abused its discretion by failing to properly apply the tests for amendment of the pleadings to assert a compulsory counterclaim and to file a third-party complaint. As demonstrated in Appellants' Brief, the tests that should have been applied both basically break down into an examination of whether or not the Appellants were diligent in the pursuit of their claims and an examination into any prejudice to Walker and Paul that would result from the assertion of those claims. The Circuit Court abused its discretion because the Appellants were diligent in the pursuit of their claims and Walker and Paul will not be prejudiced by the assertion of those claims.

² Appellants do not view this issue as being jurisdictional.

**1. Appellants were Diligent in Pursuing their Claims
Against Walker and Paul**

Despite not filing Appellants' Motion within the initial two and a half week window specified in the scheduling order,³ the Appellants were diligent in the pursuit of their claims against Walker and Paul. The delay was not due to any negligence or wrongdoing on the Appellants' part. Indeed, it is quite the opposite. The facts giving rise to the counterclaim and third-party complaint would have been discovered much sooner had Walker and Paul been candid in their responses to deposition questioning. However, they were not candid and the facts giving rise to the counterclaim and third-party complaint were discovered by happenstance in December 2004, when Appellants obtained subpoenaed documents showing details of questionable deposits into Paul's bank account.

Upon acquiring the information about the questionable deposits Appellants' counsel immediately contacted Paul's former employer, which began an investigation into the matter. Appellants' counsel also immediately contacted Walker's counsel in December 2004 and requested that Paul's deposition be re-opened to inquire into the matter, but Walker's counsel refused.

It took Paul's former employer until March 2005, to complete its investigation and on March 21, 2005, Appellants' counsel was informed that the matter was going to be turned over to the police. At this point counsel for Appellants was comfortable enough to make the serious allegations of embezzlement and fraudulent use of the embezzled funds contained in Appellants' Motion. Fourteen days later, on April 4, 2005, Appellants filed Appellants' Motion. Through no fault of the Appellants, the hearing on the Appellants' Motion was not scheduled until three

³ The April 27, 2004, Scheduling Order provided for assertion of third-party complaints by May 15, 2004, and failed to set a date for asserting counterclaims. *Docket # 11*.

months later, on July 6, 2005, and two weeks later, on July 19, 2005, the Circuit Court denied Appellants' Motion as being untimely filed without good cause to extend the deadline.

Filing Appellants' Motion was not a matter to be taken lightly. Because of the nature of the acts alleged and the criminal overtones, Appellants needed to be sure they were on solid legal and evidentiary footing before filing. With regard to every action within their control, Appellants were clearly diligent in their pursuit of the facts necessary to file Appellants' Motion. Appellants could not control the time it took the former employer to investigate the matter, how long it took to get a hearing date, or how long it took to get a ruling. Accordingly, Appellants were diligent in pursuing their claim and the Circuit Court erred in failing to so find.

2. Walker and Paul Will Not be Prejudiced by the Assertion of Appellants' Claims against them

Walker and Paul can not claim that they would be prejudiced by the assertion of the claims against them. First, Walker and Paul were on notice that the claims might be filed as early as December 2004. Second, Walker and Paul knew of the impropriety of their actions from the time that the ill-acquired funds were utilized to in order to obtain the loan. Further, any delay in discovering Walker's or Paul's wrongdoing should not be held against Appellants. Walker and Paul should not be given a procedural windfall based on their concealment of the source of the funds used to purchase the home. Accordingly, Walker and Paul cannot legitimately claim any prejudice and the Circuit Court abused its discretion in failing to consider this lack of prejudice. In fact, it is telling that Appellee did not demonstrate any prejudice to this Court.

B. The Supreme Court of Appeals of West Virginia May Hear this Appeal

The applicable legal standard regarding the "appealability" of interlocutory orders is stated in *Durm v. Heck's, Inc.*, 184 W.Va. 562, 401 S.E.2d 908 (1991). In *Durm*, this Court

recognized that, because the right to appeal to the Supreme Court of Appeals of West Virginia is not absolute, the Court is "less restrictive in interpreting the finality of an order, since upon preliminary review of the application for appeal [the Court] may reject it as being without merit." *Durm*, 401 S.E.2d at 912. The Court held in *Durm* that a motion granting summary judgment to a defendant could be appealed. The Court stated:

The key to determining whether the order granting summary judgment and dismissing Foodland from this case with prejudice is a final order subject to appeal (fn3) is not whether the Rule 54(b) language is included in the order, but whether the order "approximat[es] a final order in its 'nature and effect.'" *Taylor v. Miller*, 162 W.Va. 265, 269, 249 S.E.2d 191, 194 (1978) (quoting *Lloyd v. Kyle*, 26 W.Va. 534, 540 (1885)). Generally, an order qualifies as a final order when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945); accord *B.F. Goodrich Co. v. Grand River Dam Auth.*, 712 F.2d 453, 454 (10th Cir.1983). With the enactment of Rule 54(b), an order may be final prior to the ending of the entire litigation on its merits if the order resolves the litigation as to a claim or a party. See W.Va.R.Civ.P. 54(b); Fed.R. Civ.P. 54(b).

An examination of the order entered by the circuit court reveals that the court fully resolved the issue of Foodland's liability by ruling that "the claims brought by Plaintiff Cynthia R. Dunn arising from her alleged accident ... may be asserted only against the party then owning the property, Heck's Inc." By making this ruling and dismissing Foodland with prejudice, there can be no question that as to Foodland the litigation had ended. Accordingly, the order, if not technically final for absence of Rule 54(b) language indicating "no just reason for delay" and "directi[ng] ... entry of judgment," certainly is final in its "nature and effect." *Taylor*, 162 W.Va. at 268-69, 249 S.E.2d at 194.

Id. at 912-913 (footnote omitted).

This Court did not reject Appellants' appeal upon preliminary review, which it could have done. Further, the order denying Appellants' Motion "approximated a final order in nature and effect" because it ended the litigation on the merits between Appellant and Paul and between Appellant and Appellee with regard to the counterclaim. No less than the order dismissing

Foodland in *Durm*, the order denying Appellants' Motion was "final in nature and effect." No useful purpose could be served by waiting until the conclusion of the trial to appeal the order. Indeed, judicial economy would be achieved by a determination of the propriety of the Circuit Court Order before going through a potentially pointless trial. Therefore, this case is indistinguishable from *Durm* in practical effect and this Court should exercise its discretion to hear this Appeal.

C. Appellants Set Forth the Relief Sought in Their Proposed Counterclaim and Third-Party Complaint

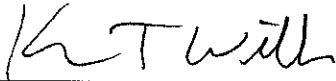
Appellee asserts that the Circuit Court Order should be affirmed because it unclear what relief is being sought and that Appellee's counsel does not represent Paul in her individual capacity. Neither of these arguments are persuasive. These exact arguments were already asserted in Appellee's Motion to Dismiss the Appeal, which was denied by this Court on January 24, 2007. The assertion that it is unclear what relief is being sought can be easily answered: Appellants are seeking to pursue their legal right to damages against Appellee and Paul for the wrongs they committed, as clearly stated in Appellants' Proposed Counterclaim and Third-Party Complaint attached to Appellants' Motion. *Docket #81*. Further, the fact that Appellee's counsel does not represent Paul in her individual capacity is completely irrelevant to the appeal of the Circuit Court Order. Accordingly, these arguments cannot be used as a basis for upholding the Circuit Court's Order.

III. Conclusion

Appellants request that this Court reverse the ruling of the Circuit Court and direct that Appellants' Motion be granted.

**H&R BLOCK MORTGAGE CORP.
OPTION ONE MORTGAGE CORPORATION**

By Counsel



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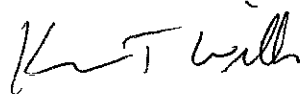
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CERTIFICATE OF SERVICE

I, Kevin T. Wills, do hereby certify that service of the foregoing ***APPELLANTS' REPLY
BRIEF*** was made upon counsel of record by mailing a true copy thereof to counsel of record on
this 9th day of February, 2007, addressed as follows:

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Kevin T. Wills